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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-967

UCO OIL COMPANY and DONALD SIMEON,

Petitioners,

vs.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

UCO Oil Company and Donald Simeon, your petitioners, respectfully pray a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on December 13, 1976.

Opinions Below

The United States District Court for the Central District of California found that each of the 30 counts contained in the instant indictment were duplicitous

and ordered the government to make an election as to which of the two offenses it would proceed to trial on. Upon the government's refusal to elect, the District Court dismissed the indictment. The government appealed to the United States Court of Appeals for the Ninth Circuit, and on December 13, 1976, a panel of that court reversed the District Court. The opinion of the Ninth Circuit has not yet been officially reported. It is reproduced as Appendix A hereto.

Jurisdiction

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on December 31, 1976. (See Appendix A.)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

I

Does 18 U.S.C. §1001 contain more than one offense?

II

In reaching a guilty verdict must a jury

be unanimous as to the means the defendant used to perpetrate the offense?

Statute Involved

Title 18 United States Code, §1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner UCO Oil Company (hereinafter "UCO") is a privately-owned, independent oil company which at pertinent times to this case operated from 70 service stations. Petitioner Donald Simeon (hereinafter "Simeon") was the corporate

controller of UCO and later became vice-president in charge of technical projects.

Petitioners were initially charged with five counts of violating 18 U.S.C. §1001 and §2. When petitioners attacked Counts 3 through 5 of this initial indictment as being duplicitious, the government obtained a second indictment (hereinafter "the indictment") which was based upon the same facts but charged petitioners with 30 counts of violating 18 U.S.C. §1001 and §2.

In short, petitioners were charged with submitting false documents to the Internal Revenue Service during an audit by that agency of UCO. Said audit was being conducted under the authority of the federal petroleum product price control legislation which was first authorized by the Economic Stablization Act of 1970, 12 U.S.C. §1904 note.

The charging language of each count of the indictment is identical and provides, in pertinent part, that:

> "On or about [a date certain], within the Central District of California, in a matter within

> the jurisdiction of IRS, an agency of the United States of America, defendants UCO and DONALD SIMEON by and through the acts of defendant DONALD SIMEON knowingly and willfully made and used a false writing and document knowing the same to contain false, fictitious and fraudulent statements and entries and falsified, concealed, and covered up by trick, scheme and device material facts, . . . in that the defendants knowingly and willfully made and caused to be made, submitted and caused to be submitted to IRS, a false writing and document . . . which statements and entries were false and fictitious as the defendants then and there well knew . . . , which falsifications resulted in a higher selling price per gallon of fuel on May 15, 1973." (Emphasis added.)

After being arraigned and entering pleas of not guilty to each of the 30 counts, petitioners filed various pretrial motions, one of which was a motion

to dismiss or, in the alternative, to compel the government to make an election. One argument urged by petitioners in this motion was that §1001 contains at least two separate and distinct offenses -- concealment of a material fact and false representation. Moreover, as each count contains both offenses, they are thereby rendered duplicitous and must be dismissed.

On April 20, 1976, the District Court conducted a hearing on petitioners' motion to dismiss, or, in the alternative, to compel an election. Following the rationale set forth above, that court ruled that each count of the indictment was duplicitous, in that, each count contains more than one offense, and that petitioners' motion to compel an election would be granted. After a conference amongst government counsel, the government declined to make an election as to which of the offenses charged in each count of the indictment the government would proceed to trial on. Petitioners then moved to dismiss the indictment because of the government's refusal to make an election, and after the

government persisted in its refusal to make an election, the indictment was dismissed.

Thereafter, the government filed a notice of appeal in the Court of Appeals for the Ninth Circuit. Briefs were filed by both sides and on October 4, 1976, the matter was argued before a panel of the Ninth Circuit. On December 13, 1976, an opinion of that panel was filed reversing the District Court. (See Appendix A.)

This petition for writ of certiorari seeks to review the judgment of the Court of Appeals for the Ninth Circuit reversing the District Court.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT BETWEEN COURTS OF APPEALS REGARDING WHETHER §1001 CONTAINS MORE THAN ONE OFFENSE

Although §1001 has not often been construed, at least one court of appeals has squarely held that §1001 prescribes more than one offense. In United States v. Diogo, 320 F.2d 898, 902 (2nd Cir. 1963), the Court of Appeals for the Second Circuit held:

> "It is well established that [§1001] encompases within its prescription two distinct offenses, concealment of a material fact and false representation. United States v. Uram, 148 F.2d 187, 190 (2d Cir. 1945); United States v. Kenny, 236 F.2d 128 (3rd Cir. 1956), cert. denied, 352 U.S. 894, 77 S.Ct. 133, 1 L. Ed.2d 87; United States v. Lang, 128 F.Supp. 797 (S.D.N.Y. 1955). The objective of both offenses may be the same, to create or foster

> on the part of a Government agency a misapprehension of the true state of affairs. Cf. Lutwak v. United States, 344 U.S. 604, 611-612, 73 S.Ct. 481, 97 L.Ed. 593 (1953). What must be proved to establish each offense, however, differs significantly. False representations, like common law perjury, require proof of actual falsity; concealment requires proof of willful non-disclosure by means of 'trick, scheme or device.'" 320 F.2d at 902.

Having more than one offense defined within a single section or subsection of the criminal code is not unusual. Other sections of Title 18 define more than one offense within the same section or subsection. For example, 18 U.S.C. §2113(a) defines two different, albeit, closely-related offenses -- bank robbery and entering a bank with intent to commit a felony. This fact was recognized by this Court in Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957), when it held that an individual could not be convicted of both

bank robbery and entering a bank with intent to commit a felony where both charges arose out of the same transaction.

A further example of two offenses being defined in one section is 18 U.S.C. §545. The Ninth Circuit recently reaffirmed that §545 contains two separate offenses -- smuggling and illegal importation -- and that charging both offenses in one count is duplicitous. United States v. Westover, 511 F.2d 1154, 1155, n.2 (9th Cir. 1975), cert. den., ___U.S.___ 95 S.Ct. 2633 (1975).

The statutes construed in Prince and Westover are similar in construction and language to §1001; therefore, the construction given those sections is supportive of the position urged by petitioners herein, that §1001 contains more than one offense.

In a footnote to the opinion, the Ninth Circuit declined to follow the holding of Diogo and, instead, found that §1001 prescribed only one offense but "enumerated several different types of fraudulent conduct". (See Appendix A, p. 3, n. 2 and p. 8.)

Due to the direct and clear conflict between the Second Circuit and Ninth Circuit regarding whether §1001 contains more than one offense, petitioners request that certiorari be granted to decide this important question of statutory construction.

II

IN REACHING A GUILTY VERDICT A JURY MUST UNANIMOUSLY AGREE AS TO THE MEANS USED TO COMMIT THE OFFENSE

Assuming that the Ninth Circuit's construction of §1001 is correct, and only one offense is defined in the section, then, each count of the indictment herein would allege that petitioners committed the offense by two different means -- either by concealing material facts or by making and using a false document, or both.

Rule 7(c)(1), Federal Rules of Criminal Procedure, permits a count to allege that the defendant committed the offense by more than one means. However, this provision in no way obviates the requirement that the jury be unanimous as to which means the defendant used to commit the

offense. Cases on this point have held that a conviction can be sustained only if there is proof that the defendant used one of the specified means to commit the offense. (E.g., Turf Center, Inc. v. United States, 325 F.2d 793, 796 (9th Cir. 1963); Todorow v. United States, 173 F.2d 439 (9th Cir. 1949), cert. den., 337 U.S. 925, 69 S.Ct. 1169 (1949).) Proof in a criminal case can only mean that the jurors were unanimous in believing that the fact was established beyond a reasonable doubt.

However, in its opinion the Ninth Circuit stated, without authority, that it is not a valid objection to a guilty verdict that the jury was not unanimous as to the means used to commit the offense. (See Appendix A, p. 8.).

To allow this ruling to stand places all defendants in an untenable position when more than one means is alleged to have been used to commit the offense, as is illustrated by the facts in this case. As was stated above, given the Ninth Circuit's construction of §1001, the

indictment alleges that petitioners violated §1001 by concealing material facts and by making and using a false document. Under existing case law, proof of either would support a guilty verdict. However, according to the Ninth Circuit petitioners would not be entitled to a jury instruction that the jury must be unanimous as to which of the two specific means of violation were proven beyond a reasonable doubt. Thus, six of the jurors could find beyond a reasonable doubt that petitioners concealed material facts, whereas the other six could find beyond a reasonable doubt that petitioners made and used a false document. While there would be no unanimity among the jurors, the result would be a guilty verdict. Clearly, this is a violation of due process and the Sixth Amendment's right to a trial by jury. Patton v. United States, 281 U.S. 276, 288, 50 S.Ct. 253, 254, 74 L.Ed. 854 (1930). Moreover, the possibility of the jurors being divided as to means used to commit the offense is even greater where, as here, the proof required to establish either means is different. (See Appendix A, p. 8, n. 2; United States v. Diogo, supra, at 902.)

In an analagous situation, the Court of Appeals for the Second Circuit has reached a different result and held that unanimity of the jurors is required. In United States v. Natelli, 527 F.2d 311 (2nd Cir. 1975), the defendants were convicted of making materially false statements in a proxy statement filed with the Securities and Exchange Commission. The count upon which the defendants were convicted set forth two specifications which were alleged to be false and proof of either would sustain a guilty verdict.

On appeal, the defendants argued that they were entitled to a jury instruction which stated that the jurors must be unanimous as to which of the two specifications they found to be false. The Second Circuit stated that while it would not be improper for the court to give such an instruction, it is not reversible error to fail to do so, since "[i]t is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." (Emphasis added.) 527 F.2d at 325.

The rationale of the court in Natelli is equally applicable to the instant situation. Petitioners are entitled to an instruction that before returning a verdict of guilty as to any one count, the jurors must be unanimous as to which means, if any, the petitioners used to perpetrate the offense.

For the reasons set forth above, petitioners request that certiorari be granted to decide this Question.

Conclusion

For the reasons expressed above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. UCO OIL COMPANY, DONALD SIMEON, *Defendants-Appellees.*	No. 76-2141 OPINION

[December 13, 1976]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY and ANDERSON, Circuit Judges, and SCHWARZER,* District Judge.

SCHWARZER, District Judge:

Defendants were indicted on thirty counts of violating 18 U.S.C. Secs. 1001 and 2. Counts three through thirty of the indictment charged them with making false statements in gasoline service station activity reports, credit card invoices and a maximum selling price form which were submitted to the Internal Revenue Service. The IRS conducted an audit of defendant UCO in the performance of its audit function under the federal petroleum product price control program of the Economic Stabilization Act of 1970. Each count of the indictment is based on a single document and charges in substance that it is both a false statement and a concealment of a material fact by trick, scheme or device. The falsifications relate to the

*Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

retail price charged for gasoline, the volume sold or the total revenue derived at particular UCO stations.[1]

This is an appeal from an order of the District Court dismissing the indictment as duplicitous after the government had refused to make an election. Defendants had contended that counts three through thirty were duplicitous in that each charged defendants both with having "made . . . false writings . . . knowing the same to contain false . . . statements" and with having "falsified, concealed and covered up by trick, scheme and device material facts . . ." The government contended that the counts were not duplicitous because each was based on the making of a single false document. The submission of that false document, the government argued, violated the two provisos of Section 1001, relating to false documents and concealing and covering up material facts. (Tr. 123; see also Tr. 112-114, 142-143.) The District Court rejected the government's contention and dismissed the indictment when the government declined to elect. (Tr. 136-138, 141-147.) Defendants also attacked the indictment as multiplicitous, but inasmuch as the District Court dismissed for duplicity, it made no formal ruling on multiplicity.

For the reasons set forth below, we vacate the District Court's order and remand.

I. *Duplicity*

Duplicity is the joining in a single count of two or more distinct and separate offenses. One vice of duplicity is that a jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense. This may conflict with a defendant's Sixth Amendment rights and may also prejudice a subsequent double jeopardy defense. Duplicity may also give rise to problems regarding the

[1]The relevant charging allegations of Count Three of the superseding indictment, which are typical of the charges in the remaining counts, allege that defendants

> "knowingly and willfully made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, and falsified, concealed, and covered up by trick, scheme and device material facts, that is, the true and correct retail price per gallon of regular, ethyl, premium or diesel fuel sold at various UCO service stations . . ." (C.T. 21)

admissibility of evidence, including its admissibility against one or more codefendants. See, *United States v. Starks,* 515 F.2d 112, 116-117 (3d Cir. 1975).

On the other hand, an indictment may not charge a single offense in several counts without offending the rule against multiplicity. Here the vice would be that the punishment provided for a single offense may be pyramided by a multi-count indictment.

The foregoing considerations, which reflect fundamental due process rights of defendants, inhibit the otherwise broad prosecutorial discretion in the drafting of indictments. See *United States v. Tanner,* 471 F.2d 128, 138-139 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972). They provide the courts with no bright line, however, dividing charges comprising a single offense from those comprising separate and distinct offenses.[2] The question in this case, whether a charge of making a false statement and concealment by trick, scheme or device based on a single document comprises separate and distinct offenses can only be answered by analysis of several relevant factors.

1. The first of these factors obviously is the language of the statute itself. In this case, the indictment charges violations of 18 U.S.C. Sec. 1001 which provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and

[2]Defendants rely on *United States v. Diogo,* 320 F.2d 898, 902 (2nd Cir. 1963), in which the court in dictum stated that Section 1001 "encompasses within its proscription two distinct offenses, concealment of a material fact and false representations." We do not take that statement to mean that the government could base two counts on the making of a single false document, charging that it is a false statement in one and concealment in the other. See *Prince v. United States,* 352 U.S. 322 (1957); *United States v. Myers,* 131 F.Supp. 525 (N.D. Cal. 1955). We think *Diogo* goes no further than to indicate that the different means of violating Section 1001 involve different elements of proof. If the *Diogo* dictum be thought to go further than we have said, we decline, to that extent, to follow it. Where the evidence of several acts or transactions alleged to violate Section 1001 differs substantially from one to the other, separate counts would presumably lie. Cf. *United States v. Uran,* 148 F.2d 187, 190 (2d Cir. 1945). One example might be a charge of the substantive crime in one count and of a conspiracy in another. See, e.g., *United States v. Starks,* 515 F.2d 112 (3d Cir. 1975); of course, no conspiracy charge is made here.

willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

On the face of it, the statute, framed in a single paragraph and providing a single penalty, does not suggest a Congressional purpose to create more than one offense. Moreover, the statute is directed at a single evil, i.e., the "perversion" of "the authorized functions of governmental departments and agencies . . . which might result from the deceptive practices described." *United States v. Gilliland,* 312 U.S. 86, 93 (1941). The types of conduct enumerated all fall within the general understanding of what constitutes fraud. As the court put it in *Charles Hughes & Co. v. Securities and Exchange Comm'n,* 139 F.2d 434, 437 (2d Cir. 1943):

"The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other."

See also, *Gusow v. United States,* 347 F.2d 755, 756 (10th Cir. 1965).

It is reasonable to conclude, therefore, that Congress was concerned with proscribing the prohibited result rather than particular kinds of conduct. That being so, consistency calls for interpreting the enumeration of different kinds of conduct in the statute as reflecting different modes of achieving that result, not separate and distinct offenses. See *United States v. Myers,* 131 F.Supp. 525 (N.D. Cal. 1955); Rule 7(c)(1), Fed. Rules of Crim. Pro. Such an interpretation of Section 1001 is corroborated by a similar interpretation given one of the statute's forerunners by the Supreme Court in *Crain v. United States,* 162 U.S. 625 (1896). The statute there involved language which in substance prohibited the making of false documents to obtain money from the United States and the knowing transmittal or presentation of any false document. The Court in *Crain* said:

"We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than $1,000.00. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect to any of the matters embraced by it." (162 U.S. at 636)

2. The second factor to be considered in determining whether the statute creates separate and distinct offenses is the legislative history and statutory context of Section 1001. That section is a part of Chapter 47 of Title 18 of the United States Code, containing some twenty-eight different sections prohibiting a wide range of "Fraud and False Statements." The particularity of each section of Chapter 47 suggests a Congressional purpose to enact separate prohibitions to deal with different fraud offenses. This view is confirmed by the 1948 revision of Title 18 which changed Section 1001 to its present form. As a part of that revision, the prohibition against false claims contained in the predecessor of Section 1001 was removed to a separate section (Sec. 287), leaving Section 1001 to deal solely with false statements and concealment. See *United States v. Bramblett,* 348 U.S. 503, 508 (1955). Thus, the legislative scheme as a whole affords no support for finding separate and distinct offenses within Section 1001.

Section 1001 may, in this respect be contrasted with 18 U.S.C. Sec. 545 which prohibits, in separate paragraphs, the clandestine introduction or smuggling of goods into the United States and the importation of merchandise contrary to law or its subsequent knowing handling. See *United States v. Westover,* 511 F.2d 1154, 1155 note 2 (9th Cir.), *cert. denied* 422 U.S. 1009 (1975). As explained in *Babb v. United States,* 218 F.2d 538, 539-540 (5th Cir. 1955), Section 545 is an amalgamation of two separate statutes of different origins, reflecting a long-standing Congressional purpose to treat as separate and distinct offenses the clandestine introduction of goods into this country by illegal means and the importation and handling of goods in violation of law.

A similar analysis is reflected in *Blockburger v. United States,* 284 U.S. 299 (1932), in which the Court sustained convictions under two counts based on a single sale of narcotics. Each count was charged under a different section of the statute, one prohibiting sales except in the original package bearing the required federal stamps, the other prohibiting sales without a written order of the purchaser on a form issued by the Internal Revenue Service. The Court there said:

> "The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in Secs. 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act." (284 U.S. at 304)

See also, *Gore v. United States,* 357 U.S. 386, 390-391 (1958) (multiple counts for a single sale of narcotics alleged to violate different statutory prohibitions); *Callanan v. United States,* 364 U.S. 587, 597 (1961).

3. The third factor to be considered is the nature of the proscribed conduct itself. As heretofore discussed, the making of false statements and the concealment of a material fact by trick, scheme and device are not distinctly different kinds of conduct. Not only are they regarded as within the conventional understanding of fraud but they may well merge into each other, blurring any conceptual distinctions one might otherwise find. Thus, in this case, the government charges that the making of a

report which falsely states total gallons sold may also result in a device by which the true price per gallon is concealed. Reason and fairness support the conclusion that only one offense is charged.

4. The fourth factor concerns the appropriateness of multiple punishment for the conduct charged in the indictment. In the leading case of *Bell v. United States,* 349 U.S. 81 (1955), the Supreme Court laid down a presumption against construing penal statutes so as to lead to multiple punishment:

> "When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." (349 U.S. at 83)

The fact that a statute encompasses various modes of violation requiring different elements of proof—as is the case here—does not compel a different result. In *Prince v. United States,* 352 U.S. 322 (1957), the Court held, under the bank robbery statute (18 U.S.C. Sec. 2113) which prohibits both bank robbery and entry with intent to commit robbery and requires proof of different facts for each, that only one punishment could be imposed for one entry. The Court reasoned that Congress' purpose was to permit conviction regardless of whether the robbery had been completed, not to pyramid punishment. Similarly, in *United States v. Sahley,* 526 F.2d 913, 918 (5th Cir. 1976), the Fifth Circuit held that under Sec. 1001 only one punishment could be imposed for a single document, although it contained several false statements. See also *Heflin v. United States,* 358 U.S. 415 (1959). Compare *Babb v. United States* and *Blockburger v. United States,* above.

In the absence of some evidence to the contrary, it is difficult to assume Congress intended that a defendant found guilty of falsifying one document be exposed to two or more sentences of up to five years imprisonment and a $10,000 fine each.

The foregoing analysis leads us to the conclusion that Congress, in enumerating several different types of fraudulent conduct in Section 1001, did not create separate and distinct offenses. We are satisfied that had the government used any particular false report as the basis for two counts, one charging a false statement and the other a concealment by trick, scheme or device, the indictment would be vulnerable to attack for multiplicity.

Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment. *United States v. Alsop,* 479 F.2d 65, 66 (9th Cir. 1973). Proof of any one of the allegations will sustain a conviction, (*Todorow v. United States,* 173 F.2d 439 (9th Cir.), *cert. denied,* 337 U.S. 925 (1949)) but a judgment of guilty will bar any further prosecution with respect to any of the prohibited means embraced within the count. *Turf Center, Inc. v. United States,* 325 F.2d 793, 796 (9th Cir. 1963); 8 J. MOORE, FEDERAL PRACTICE, para. 7.01(2)(2d ed. 1976); Rule 7(c)(1), Fed. Rules Crim. Pro. It is not a valid objection that the government has not disclosed its theory of proof in the indictment, see *United States v. Markee,* 425 F.2d 1043, 1047-1048 (9th Cir.), *cert. denied,* 400 U.S. 847 (1970), nor that the jury, in arriving at a unanimous verdict, may not agree on the particular means by which the offense was committed.

II. *Multiplicity*

Defendants have also contended that counts three through thirty are multiplicitous. Inasmuch as the District Judge dismissed the indictment as duplicitous, he did not reach this issue. It is appropriate for us to state our view on the issue, however, for the court's guidance on remand.

Defendants' contention is that submission of a false document to the government is an essential element of a violation of Section 1001. Accordingly, they argue, regardless of how many false

documents may have been prepared, there are only as many offenses as there are submissions, and two or more counts based on one submission are multiplicitous.

We are aware of only one decision on the issue.[3] In *United States v. Bettenhausen,* 499 F.2d 1223, 1234 (10th Cir. 1974), the Tenth Circuit rejected the same contention defendants make here. Congress, in Title 18, has clearly recognized the distinction between making false documents and passing them. See, e.g., 18 U.S.C. Secs. 471 and 472. We cannot read into Section 1001 an element which Congress did not articulate, i.e., submission of the document. That is sufficient reason to reject defendants' argument.

The order dismissing the indictment is vacated and the case is remanded for further proceedings in conformity with this decision.

[3]Neither of the cases cited by defendants, *United States v. Rajewski,* 526 F.2d 149 (7th Cir.), *cert. denied* ... U.S. ..., 96 S.Ct. 2231 (1976), and *United States v. Sahley,* above, supports their position.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

UCO OIL COMPANY AND DONALD SIMEON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the multiple-count indictment in this case was duplicitous.

An indictment returned in the United States District Court for the Central District of California charged petitioners—a privately-owned oil company (UCO) and its corporate comptroller—with numerous counts of having fraudulently concealed material facts in false documents submitted to the Internal Revenue Service, in violation of 18 U.S.C. 1001.[1] The documents in question were gasoline service station activity reports, credit card invoices,

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[1]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material

and maximum selling price forms that reported the retail price charged for gasoline, the volume of gasoline sold or the total revenue derived from such sales at particular UCO stations. Each count was based upon a single document and charged, in substance, that the document was both a false statement and a concealment of a material fact by trick, scheme, or device.[2]

In a pretrial motion to dismiss the indictment, petitioners argued that each count was duplicitous because it stated two separate offenses. Following a hearing, the district court granted petitioners' motion and dismissed the indictment (Tr. 136-138, 141-147).[3] On appeal, the court of appeals reversed, holding that Congress, in enumerating several different types of fraudulent conduct in Section 1001, did not create separate and distinct offenses but simply listed different means by which the same offense could be committed (Pet. App. 8).

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fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2]Count three of the indictment, which is typical, alleged that petitioners "knowingly and willfully made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries and falsified, concealed, and covered up by trick, scheme and device material facts, that is, the true and correct retail price per gallon of regular, ethyl, premium or diesel fuel sold at various UCO service stations * * *, in that the defendants knowingly and willfully made and caused to be made, submitted and caused to be submitted to IRS [the following] false writing[ ] and document [ ] * * *."

[3]"Tr." refers to the one-volume transcript of the hearing on petitioners' motion to dismiss the indictment.

1. Petitioners contend (Pet. 8-11) that each count of the indictment, charging them with knowingly making a false statement and concealing a material fact by trick, scheme or device, alleged two separate and distinct offenses. Whatever may be the merit of this contention, and we argue below that there is none, there is no need for the Court to grant review at this time.

The petition challenges only the court of appeals' reversal of the district court's pretrial dismissal of the indictment, a reversal that puts petitioners in the same position as if the district court had ruled against them in the first instance. That ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States,* 309 U.S. 323; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.,* 389 U.S. 327. Similarly, review by this Court of the court of appeals' decision would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed, they will then be able to present their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals correctly rejected petitioners' contention in a thorough opinion upon which we rely (Pet. App.). In concluding that 18 U.S.C. 1001 states a single offense that may be accomplished by different means, the court analyzed in detail the language of the statute, its legislative history, and the nature of the conduct that it proscribes, and the application to the statute of the rule that doubts in the enforcement of a criminal statute are to be resolved against the imposition of multiple punishment. The court found that the statute, which is framed in a single paragraph and provides for a single penalty, "is directed at a single evil, i.e., the 'perversion' of 'the authorized functions of governmental departments and agencies

. . . which might result from the deceptive practices described.' *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941)" (Pet. App. 4). The court reasoned that "[t]he types of conduct enumerated all fall within the general understanding of what constitutes fraud"[4] and that it was therefore logical to conclude "that Congress was concerned with proscribing the prohibited result rather than particular kinds of conduct" (Pet. App. 4). The court went on to state (*id.* at 6-7):

> * * * [T]he making of false statements and the concealment of a material fact by trick, scheme and device are not distinctly different kinds of conduct. Not only are they regarded as within the conventional understanding of fraud but they may well merge into each other, blurring any conceptual distinctions one might otherwise find. Thus, in this case, the government charges that the making of a report which falsely states total gallons sold may also result in a device by which the true price per gallon is concealed. Reason and fairness support the conclusion that only one offense is charged.[5]

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[4]Cf. *Charles Hughes & Co.* v. *Securities and Exchange Commission*, 139 F. 2d 434, 437 (C.A. 2):

> The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other.

See also *Gusow* v. *United States*, 347 F. 2d 755, 756 (C.A. 10).

[5]Petitioners rely upon *United States* v. *Diogo*, 320 F. 2d 898, 902 (C.A. 2), in which the court, *in dictum*, stated that Section 1001 "encompasses within its proscription two distinct offenses, concealment of a material fact and false representations." The primary support for this statement, however, was the prior decision in *United States* v. *Uram*, 148 F. 2d 187, 190 (C.A. 2), in which the court pointed out that the acts alleged (false statements and concealment of a material fact) "did not even concern the same facts." The court of appeals in this case agreed that "[w]here the evidence of several acts or transactions alleged to violate Section 1001 differs substantially from one to the other, separate counts would presumably lie," but it properly declined to construe the above-quoted statement from *Diogo* to mean "that the government could base two counts on the making of a single false document, charging that it is a false statement in one and concealment in the other. See *Prince* v. *United States*, 352 U.S. 322 (1957); *United States* v. *Myers*, 131 F. Supp. 525 (N.D. Cal. 1955)" (Pet. App. 3 n. 2).

3. In reaching its conclusion, the court of appeals stated: "It is not a valid objection * * * that the jury, in arriving at a unanimous verdict, may not agree on the particular means by which the offense was committed" (Pet. App. 8). Petitioners now contend (Pet. 11-15) that this statement will preclude them from obtaining an instruction "that the jury must be unanimous as to which of the two specific means of violation was proven beyond a reasonable doubt" (Pet. 13).

Whether or not such an instruction would be appropriate in another case, it is clear that, under the indictment in this case, the instruction would be unnecessary. As to each count, the indictment charges that petitioners "knowingly and willfully made and used false writings and documents knowing the same to contain false * * * statements and entries and falsified, concealed, and covered up by trick, scheme and device material facts, that is, the true and correct retail price per gallon * * *, *in that* [they] knowingly and willfully made and caused to be made * * * false writings and documents [representing either that certain revenues had been received or that a certain quantity of gallons had been sold for a certain total price or at a certain price per gallon or unit cost] * * *" (emphasis added). It is thus apparent that, to find that the defendants "concealed" material facts—*i.e.*, the true retail price per gallon—the jury will have to find beyond a reasonable doubt that they deliberately prepared documents containing false statements regarding volume sold, total revenue

or retail price. Under this indictment, a finding that petitioners concealed material facts would necessarily entail a finding that they made and submitted false statements, and there is thus no merit to petitioners' claim that some members of the jury might find concealment and others find the making of false statements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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